In the

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 638.

APEX HOSIERY COMPANY,

Petitioner,

against

WILLIAM LEADER and AMERICAN FEDERATION OF FULL FASHIONED HOSIERY WORKERS,

Respondents.

BRIEF ON BEHALF OF LABOR LAW COMMITTEE OF NATIONAL LAWYERS GUILD, *AMICUS CURIAE.*

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Statement.

This brief is submitted, by permission of the Court, on behalf of the Committee on Labor Law of the National Lawyers Guild, because of the great interest of the questions involved in this case to the legal profession and the community at large.

The Problems Involved.

The case involves two problems, but only one is necessary for the disposition of the case. The consideration of the other depends on whether this Court desires to limit its decision strictly to the case at bar, or settle the larger legal problems involved in this case, which problems have become acute because of the many prosecutions against labor unions under the federal anti-trust laws now pending throughout the country.

In so far as the present case is concerned, the problem is a simple one: namely, whether the enactment of the National Labor Relations Act has brought within the scope of the Sherman Anti-Trust Act cases which had theretofore been without its purview, under the decisions of this Court, so as to subject labor unions to criminal prosecutions and civil liability for damages under the Sherman Anti-Trust Act in cases in which they could not have been so prosecuted or made liable before the adoption of that Act. In other words, the problem as related solely to this case is whether or not the decisions of this Court in the cases under the National Labor Relations Act had *expanded* the scope of the Sherman Act and *extended* the liability of labor unions thereunder.

The larger problem involved in this case, but not absolutely necessary to its decision, is really a double problem. It involves, first, the problem of the clarification of previous decisions of this Court under the Sherman Act in its relation to labor disputes, including the question as to whether certain of those decisions had been correctly decided; and, second, whether the legislation enacted by Congress since the *Bedford Cut Stone* case, which is the last one in which the problem of the applicability of the Sherman Act to labor had been directly considered by this Court, has made the Sherman Act *no longer applicable* to labor disputes.

ARGUMENT.

I.

The decision of the Court of Appeals was clearly right under the law as laid down by this Court previous to the enactment of the National Labor Relations Act, and the National Labor Relations Act has not extended the liability of respondents under the Sherman Act.

It is clear that but for the enactment of the National Labor Relations Act, and the decisions of this Court thereunder, the decision of the Court of Appeals here under review would not have been questioned. That decision was clearly right under the decisions of this Court in the *Coronado* and other cases. Such was the original decision of the District Court when the case first came before that Court,[1] and the decision under review merely applies established law. It was, however, argued below and will be argued here, that the enactment of the National Labor Relations Act has changed the legal situation by *expanding* the concept of interstate commerce, thereby *extending* the liability of labor unions under the Sherman Act, so as to include the present case. And the decisions of this Court under the National Labor Relations Act are cited as authority for that contention. Such was the opinion of the Circuit Court of Appeals on the first appeal,—the appeal from the original decision of the District Court dismissing the injunction suit, which was a companion suit to the present action.[2] That opinion, we respectfully submit, was clearly erroneous, and the later decision of the same Court of Appeals, reversing its earlier position,[3] was and is, clearly right. The judgment appealed from should, therefore, be affirmed.

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[1] *Apex Hosiery Co.* v. *Leader*, 20 Fed. Sup. 138.
[2] *Apex Hosiery Co.* v. *Leader*, 90 F. (2nd) 155.
[3] *Leader* v. *Apex Hosiery Co.*, 108 F. (2nd) 71.

II.

The federal anti-trust laws are not applicable to labor disputes.

1. The federal anti-trust laws were never intended to apply to labor disputes. The decisions of this Court (with the exception of the second *Coronado* case), in which this Court has held the Sherman Act applicable to labor disputes, were limited to cases of the boycotting of commodities *in* interstate commerce, and proceeded upon the theory that after a commodity has become an article of interstate commerce it is the nature of the commodity affected rather than the nature of the dispute which was decisive. In this, we respectfully submit, the Court was in error, in that the inquiry should be not as to the nature of the commodity affected, but as to the nature of the dispute involved.

The *Coronado* cases are somewhat *sui generis:* On the one hand, the distinction was recognized between commodities in interstate commerce and a dispute with respect to terms and conditions of labor,—the decision in the second *Coronado* case proceeding upon the theory that the object of the agreement or conspiracy was the price of coal in interstate commerce, and that the labor dispute was merely an incident of a larger object which the conspirators sought to accomplish, namely, the control of the price of coal in interstate commerce *generally*. But, on the other hand, the court overlooked the fact that the so-called conspirators were not interested in the price of coal in interstate commerce, *as such;* that their real object,—that is to say, their altimate object,—was not the fixing of coal prices, but the term and conditions of the labor contract. Both, the immediate conflict involved in the *Coronado* cases and *the ultimate object or purpose to which this dispute was a step*, were concerned with the terms and conditions of the labor contract and not with the price of coal. The object of this alleged conspiracy began and ended with the labor contract, which was the real *concern* of the alleged conspirators; and the affectation of the price of coal in interstate commerce was merely an incident, intermediate between the overt acts involved in the case and the object sought to be accomplished by the alleged conspirators.

2. Whatever the law as laid down by this Court in the last of its decisions in which this problem was considered, it is clear that Congress, by subsequent legislation, has made the federal anti-trust laws inapplicable to labor disputes. In this Congress has proceeded steadily in accordance with its original intention that anti-trust laws should not be applied to labor because the evil designed to be remedied by these laws lay in a different social and economic domain. The anti-trust laws were intended to preserve competition in interstate commerce, and to prevent interstate commerce from monopolization. But it was never the policy of the United States to foster competition among laborers, or to prevent their combination into strong organizations which could control the price and other conditions of labor. On the contrary: The beneficial effects of labor combinations was recognized as early as the earliest of our anti-trust laws. And as time proceeded, this recognition was brought home, more and more, to the people of this country and to the Congress of the United States. So much so, that at the commencement of the fifth decade after the enactment of the first anti-trust law by Congress, Congress embarked upon a course of legislation which not only *recognized* the beneficial effects of labor organizations and their activities, but *fostered the growth* of such organizations. In pursuance to this policy, Congress enacted a series of laws intended to protect labor organizations in the very activities which would be prohibited under the anti-trust laws if those laws were held applicable to labor.

After fifty years of controversy, we respectfully submit, that it can now no longer be disputed that as a matter of historical fact Congress had intended that the Sherman Act should not be applied to labor disputes. And the confusion existing in the professional mind, and in some of the adjudicated cases, with respect to this subject, is due, we respectfully submit, to a failure to differentiate between the acts of labor union officials while engaged in carrying out the legitimate objects and purposes of their organizations on the one hand, and acts which they may engage in for purposes

not recognized by labor unions as among their objectives, on the other. In other words, it is assumed that a holding that the federal anti-trust laws are inapplicable to labor disputes, would be tantamount to holding that officials of labor unions who went out of their way to become part of a price-fixing combination *as such* were exempt from prosecution under the Sherman Act. Such is not our contention. But, on the other hand, a holding that such labor union officials were within the purview of the Sherman Act, need not, *and should not*, be followed by a holding that an agreement among members of a labor union, or among labor unions, to pursue the legitimate objects of labor unionism—*including the object of attempting to organize all the workers of a given industry into one union*—is within the prohibitions of the Sherman Act. And that is true even though the attempt to carry out such objective may involve an interruption of the production of goods destined *for* interstate commerce, or the transportation of goods *in* interstate commerce; or the purchase and sale by the public at large of one commodity rather than another, or the same commodity from one merchant rather than from another.

It must be borne in mind that we are dealing with a conspiracy statute; and that, therefore, the decisive elements are the *agreement* and *object* of the conspiracy. *The essence of the conspiracy is the agreement; and the essence of the agreement is its object.*

It is the agreement that is prohibited and not the means whereby it is carried out.

In this respect a conspiracy under the anti-trust laws is different from a common law conspiracy. If the object is the monopolization or restraint of interstate commence, the agreement to carry out that object is prohibited irrespective of the nature of the means intended to or actually employed in carrying it out. Indeed, the act is violated the moment the agreement is made even *if nothing were done thereunder*.[4] The nature of the means employed cannot, therefore, possibly

[4] *Nash* v. *United States*, 229 U. S. 373.

have any effect on the legality or illegality of the agreement. It follows, as a corollary, that the means employed for the purpose of carrying out a certain objective is a matter of indifference from the point of view of the anti-trust laws; and that the character of the means employed cannot bring within the purview of the anti-trust laws any objective or conspiracy which would not be within its purview if other means had been employed for the purpose of carrying it out.

3. It is settled by the decisions of this Court that the means employed is irrelevant to the issue as to whether or not a given agreement or conspiracy comes within the prohibitions of the Sherman Act. This is the rule generally under the anti-trust laws, and is no different where the question presented is that of its applicability to a labor dispute. In other words, the anti-trust laws were intended to accomplish certain economic results, and not to punish reprehensible conduct of individuals or groups. Such was the law of monopolies and restraints of trade under the common law; and such is the law under the federal anti-trust laws. It is significant in this connection, that at the very time that Congress was engaged in enacting a series of laws which made the anti-trust laws inapplicable to labor disputes, Congress enacted a law to safeguard interstate commerce from acts illegal, *per se, and exempted labor unions from its operation.*

While the two classes of laws have no relation to each other, in the sense that they are not part of an attempt to cure the same evil, it is of significance that they were enacted at the same time. And the significance is this: The growth of interstate commerce, and its growing complexity, made it necessary for Congress to change its attitude of passive benevolence towards labor organizations as a means of protecting and fostering interstate commerce. This development of interstate commerce also brought with it certain illegal practices which made it necessary for Congress to depart from its earlier policy of legislating only with respect to the *control* of interstate commerce, leaving attacks upon that

commerce by acts illegal *per se* to the states through which interstate commerce necessarily flows. But the protection of interstate commerce against acts illegal *per se*, now assumed by the Federal Government, was not effected by an amendment to the anti-trust laws but by specific legislation directed to that end,—thus clearly demonstrating that in the mind of the law-giver the *economic* problem of the *control* of interstate commerce, on the one hand, and what may be termed the *police* problem of protecting interstate commerce against acts *per se* illegal, on the other, were separate and distinct problems, requiring separate and distinct modes of treatment.

The so-called Anti-racketeering Act is, therefore, further proof,—if further proof were necessary,—that in applying the anti-trust laws *the means used to attain a certain result* may not be taken into consideration. *Only the objects and purposes of the agreement or conspiracy may be considered.*

POINTS.

PART ONE.

The decision appealed from was clearly right under the decisions of this Court under the Sherman Act; and the decisions of this Court under the National Labor Relations Act have not had the effect of extending the applicability of the Sherman Act to Labor Disputes.

POINT I.

It is clear that but for the possible effect of the National Labor Relations Act this case would not come within the purview of the federal anti-trust laws.

It seems to us to be beyond dispute, that but for the possible effect of the decisions of this Court interpreting the

National Labor Relations Act it could not be seriously argued that the present case comes within the purview of the federal anti-trust laws. The history of this litigation proves that beyond peradventure of a doubt. It will be recalled that when the question first came before the District Court, in the injunction suit, that Court dismissed the complaint on the ground that neither the complaint, nor the complaint plus the evidentiary matters submitted on the application for an injunction *pendente lite*, disclosed a case within the Sherman Act as theretofore interpreted by this Court. That the District Court, in so deciding, was right will become evident upon a mere reading of those portions of the complaint which stated the object of the "conspiracy". The pertinent allegations of the complaint are as follows:

> "For some time prior to May 6, 1937, defendant union unsuccessfully endeavored to enroll all of plaintiff's employees in its membership, which employees, however, preferred, of their own free will and accord, not to join any organized union and more particularly, not to join defendant's union.
>
> "Plaintiff is informed, believes, and therefore avers that prior to May 6, 1937, and on all dates hereinafter mentioned, by reason of defendant's failure to unionize plaintiff's plant on what is known to be a 'closed shop' basis, defendants thereupon decided upon more drastic and extreme measures *to force the unionization of plaintiff's plant*, and to force plaintiff to sign what is popularly known as a 'closed shop union agreement' * * * *and to this end*, defendants did unlawfully seek to force, coerce, intimidate and compel the employees of plaintiff to become members of defendant's union * * *
>
> "*To this end*, defendants committed the unlawful acts related in this and the succeeding paragraphs of this complaint, to wit:" (Complaint, pp. 10-12. Italics supplied.)

This statement of the *end sought to be attained* by the respondents, is followed by the allegation that certain acts, illegal *per se*, but of a purely local character, were committed by the respondents, *in pursuance to the alleged* "conspiracy"

and in order to accomplish its purposes. That the acts in themselves were of a purely local character, and but for any connection with the conspiracy to monopolize or restrain interstate commerce would not be illegal under any federal law, will not be disputed. But their legal significance deriving from the alleged restraint of interstate commerce was, of necessity, dependent upon the end of the conspiracy as stated by the pleader himself, as quoted above. And that such a conspiracy was not within the purview of the Sherman Act as construed by this Court prior to its decisions in the *Jones and Laughlin* and accompanying cases, had been settled by a long line of decisions by this Court and of the inferior courts following the decisions of this Court. It would be a vain show of learning on our part to attempt to cite the many cases that could be cited in this connection. We shall, therefore, limit ourselves to a brief discussion of the two *Coronado* cases, in which the question was carefully considered and definitely settled.

What may be called the physical facts were the same in both of the *Coronado* cases—the facts being substantially as follows: The defendants in that case—a miners' union and its officials—in an effort to unionize the workers of the plaintiff's mine, and to prevent its operation by non-union workers, destroyed the operating machinery of the mine, and also a carload of coal which was ready and billed for shipment in interstate commerce, thereby preventing the operation of the mine and the flow of its product in interstate commerce. Upon these identical facts this Court decided in the first case that the case did not come within the purview of the anti-trust laws and in the second case that it did—the decision turning upon the *purpose* of the defendants in stopping the flow of the product of the mine in interstate commerce as disclosed at the two trials. In other words, the turning point was the presence or absence of an *intent* to monopolize

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While there was a difference in the evidence adduced at the two trials, or brought out on the two arguments in this Court, as to the amount of coal involved, we do not believe that that circumstance affected the result.

or restrain interstate commerce, and not upon the physical question of the stoppage of that flow. In the first case this Court said:

> "Coal mining is not interstate commerce, and *obstruction of coal mining, though it may prevent coal from going into interstate commerce, is not a restraint of that commerce unless the obstruction to mining is intended to restrain commerce in it,* or has necessarily such a direct, material, and substantial effect to restrain it that the intent reasonably must be inferred.
>
> "In the case at bar, there is nothing in the circumstances or the declarations of the parties to indicate that Stewart, the president of District No. 21, or Hull, its secretary-treasurer, or any of their accomplices, had in mind interference with interstate commerce or competition when they entered upon their unlawful combination to break up Bache's plan to carry on his mines with nonunion men. *The circumstances were ample to supply a full local motive for the conspiracy.* Stewart said: 'We are not going to let them dig coal —the scabs.' *His attention and that of his men was fastened on the presence of non-union men in the mines in that local community.* The circumstance that a car loaded with coal and billed to a town in Louisiana was burned by the conspirators has no significance upon this head. The car had been used in the battle by some of Bache's men for defense. It offered protection, and its burning was only a part of the general destruction." (Italics supplied.)

United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 410-411.

The principle thus laid down, that the mere stoppage of production intended for interstate commerce does not bring the case within the purview of the federal anti-trust laws in the absence of an attempt to monopolize or restrain that commerce, was not only adhered to but emphasized in the second *Coronado* case. We shall not stop at this point to consider whether or not the second *Coronado* case was correctly decided under the principles of the first *Coronado* case. Suffice it to say here, that, correctly or otherwise, the

point upon which the decision in the second case turned was that the facts at the second trial disclosed a *purpose to influence the price of coal in interstate commerce.* The rule of law which differentiates between a stoppage of the flow of interstate commerce and an intention to monopolize or restrain that commerce was thus stated by this Court, in the concluding paragraph of its opinion in the second *Coronado* case:

> "*The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce.* But when *the intent* of those unlawfully preventing the manufacture or production *is shown to be to restrain or control* the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-trust Act. United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 408, 409; United Leather Workers International Union v. Herkert & M. Trunk Co., 265 U. S. 457, 471; Industrial Asso. v. United States, 268 U. S. 64 (decided April 13, 1925). We think there was substantial evidence at the second trial in this case tending to show that the purpose of the destruction of the mines was to stop the production of nonunion coal and prevent its shipment to markets of other states than Arkansas, where it would by competition tend to reduce the price of the commodity and affect injuriously the maintenance of wages for union labor in competing mines . . ." (Italics supplied.)
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> *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 298, 310.

As already stated, there is no allegation in the complaint herein that the illegal acts complained of were done for the purpose and with the intent of monopolizing or *controlling* interstate commerce. On the contrary, as appears from the passage quoted above, the complaint expressly avers that the acts complained of were committed in pursuance of a purpose to unionize plaintiff's factory or forcing upon it a

closed-shop agreement,—both of which were clearly local matters, and neither of them is in any way related to an intent to restrain interstate commerce. The District Court was, therefore, clearly right when it dismissed the complaint in the injunction suit on the ground that the matters complained of had no relevancy to interstate commerce and were not within the purview of the Sherman Act.

Apex Hosiery Co. v. *Leader*, 20 Fed. Supp. 138.

POINT II.

The National Labor Relations Act has not expanded the meaning of interstate commerce, nor enlarged the operation of the anti-trust laws.

The correctness of the decision of the District Court in the injunction suit, (apart from the effect of the National Labor Relations Act), was not questioned in any way by the Circuit Court of Appeals when an appeal was taken by the plaintiff in that case (petitioner herein) from that decision. Indeed, the correctness of the decision of the District Court under the rules laid down by this Court anterior to the decisions under the National Labor Relations Act was admitted at least inferentially. For, the decision of the Circuit Court of Appeals reversing the decision of the District Court in the injunction suit was based solely upon its interpretation of the decisions of this Court under the National Labor Relations Act. In the statement introductory to its discussion of the decisions of this Court under the National Labor Relations Act, the Court of Appeals said:

> "It would not be profitable here to trace the expanding definitions and applications of 'commerce' as used in the past in the Constitution and the Sherman Act under other conditions. *We are concerned with what the law is today.*" (Italics supplied.)

Apex Hosiery Co. v. *Leader*, 90 F. (2d) 155, 159.

This statement was followed by a discussion of the import and meaning of the decisions of this Court in the *Jones & Laughlin* and *Friedman-Harry Marks* cases,[6] which led the Court of Appeals to the conclusion that this Court had expanded the meaning of interstate commerce as used in the Sherman Act so as to include *production for* interstate commerce.

That reasoning was clearly erroneous in two respects: In the first place, we are not concerned here with the constitutional power of Congress, but rather with the intentions of Congress in the exercise of that power. And, secondly, even with respect to the constitutional power of Congress it is incorrect to treat the concept of "interstate commerce" as if it were a technical term which either includes or excludes certain subjects or spheres of activity. For the purpose of this case, however, we need not concern ourselves with the second problem, for it is clear that we are not dealing here with a problem of constitutional power but with one of statutory construction. The problem before us is not what *power* Congress has, but what Congress has done in the exercise of its power. And as to that there can be no two opinions: A comparison of the two statutes clearly indicates the intention of Congress to differentiate between matters *in* interstate commerce and matters *affecting* interstate commerce. Its *constitutional power* is not limited to matters *in* interstate commerce, but extends to all matters *affecting* interstate commerce. But in exercising that power it has dealt in the one case with *interstate commerce as such*, and in the other with *matters affecting interstate commerce*. A comparison of the texts of the two statutes clearly reveals that. The first sentence of the first section of the Sherman Anti-Trust Act reads as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, *in restraint of trade or*

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[6] *N. L. R. B.* v. *Jones & Laughlin Steel Co.*, 301 U. S. 1; *N. L. R. B.* v. *Friedman-Harry Marks*, 301 U. S. 58.

commerce among the several states, or with foreign nations, is declared to be illegal."

U. S. Code, Title 15, Sec. 1.

And the second section of that Act reads:

"Every person who shall monopolize, or attempt to monopolize * * * *any part of the trade or commerce among the several states* or with foreign nations, shall be deemed guilty of a misdemeanor." (Italics supplied.)

U. S. Code, Title 15, Sec. 2.

It is clear from the language of the statute that Congress was dealing with interstate commerce as such, and that nothing that is not interstate commerce was intended to be covered thereby. It is this language that is the basis of all of the decisions of this Court under the Sherman Act from the *Knight* case (*U. S. v. E. C. Knight Co.*, 156 U. S. 1) to date.

But the National Labor Relations Act does not speak simply of "commerce" or "*the* commerce," but of matters "*affecting* commerce." It is clear that the phrase "affecting commerce" was used in order to make sure that the decisions of the courts under the anti-trust laws would not apply. And in order to further insure that result, and to show clearly that in legislating with respect to labor relations it was not confining itself to the subject-matter covered by the anti-trust laws, Congress further defined the phrase "affecting commerce" as follows:

"The term 'affecting commerce' means *in* commerce, *or burdening or obstructing commerce or the free flow of commerce, or* having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." (Italics ours.)

U. S. Code, Title 29, Sec. 152.

Congress has thus, in the clearest language possible, expressly stated that the National Labor Relations Act is not limited to matters "*in* commerce," but extends to many other matters which merely have a certain relation to commerce.

And the decisions of this Court dealing with that Act have, from first to last, stressed the point that this Act is not limited to matters *in* commerce, but extends to all matters *affecting* commerce in a certain way.

> *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U. S. 1.
>
> *N. L. R. B.* v. *Fruehauf Trailer Co.*, 301 U. S. 49.
>
> *N. L. R. B.* v. *Friedman-Harry Marks Clothing Co.*, 301 U. S. 58.
>
> *Santa Cruz Fruit Packing Co.* v. *N. L. R. B.*, 303 U. S. 453.
>
> *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197.

We need not discuss all of these cases, for the last one is decisive of the question here involved, *—since the decision in that case expressly proceeded upon the theory that the employer in question was not engaged in interstate commerce.* In discussing the problem of jurisdiction in that case, the Circuit Court of Appeals of the Second Circuit said:

> "*It is not contended that the petitioners are themselves engaged in commerce as so defined.* They are local public utility corporations and their production and distribution of electricity, gas, and steam are carried on solely within the City of New York and the adjacent Westchester County. The contention of federal jurisdiction over the labor relations of such employers is rested upon the argument that an interruption of their business by an industrial labor dispute would vitally affect commerce, because (1) in producing electric energy, gas, and steam they use large quantities of raw materials originating outside the state of New York, and (2) some of their customers are engaged in interstate or foreign com-

merce or are instrumentalities of such commerce." (Italics ours.)

Consolidated Edison Co. v. N. L. R. B., 95 Fed. (2d) 390, 392.

And the jurisdiction was sustained by the Circuit Court of Appeals principally on the second ground. And during the argument of that case in this Court, present counsel, as counsel for the labor-union seeking to sustain the jurisdiction of the National Labor Relations Board, practically waived the claim of jurisdiction under the first ground, and limited the argument to the claim of jurisdiction on the second ground, saying,—

> "In this connection it must be remembered that the problem presented in this class of cases is never whether or not *the employer* is *engaged* in interstate commerce. That was the contention put forward and definitely rejected by this Court in the group of cases decided April 12, 1937. We have, therefore, in the statement of facts with reference to the activities of the companies involved herein deliberately left out some rather important facts relating to the purchase by them of materials in other States and transported to them in interstate commerce, and the sale by them of certain by-products in interstate commerce. As we view the law, these facts,—while important enough, and probably sufficient in themselves to give the National Labor Relations Board jurisdiction,—are relatively unimportant in this case. As we view the situation,—the combination of law and fact involved in this case,—the interference with and burden upon interstate commerce which would result from a labor dispute between the Consolidated Edison System and its employes would be much greater from a cessation of any of its *services* than from a cessation of its business either by way of purchases of raw materials or sales of commodities. We therefore consider the technical nature of the *business* conducted by the companies a relatively subordinate matter, which dwindles into insignificance besides the really important question,—*the effect upon interstate commerce of a cessation of the services involved.*"

And as we read the decision of this Court in the *Consolidated Edison* case, this Court, disregarding the question of Consolidated Edison's buying or selling anything in interstate commerce, based the decision in that case squarely on the principle that the problem under the National Labor Relations Act is not whether or not the employer in question is in interstate commerce, but whether or not the activity is such that a cessation thereof might affect interstate commerce. And when a court comes to the conclusion that the cessation of the activity of the employer in question might adversely affect interstate commerce, the labor relations of that employer would be within the purview of the National Labor Relations Act, even though that activity itself,—whether it be service or trade,—were concededly intrastate. In other words: "Affecting interstate commerce" and "interstate commerce" or "in interstate commerce" are not convertible terms,—the first term embracing a much larger field than the others. An activity may *affect* interstate commerce and therefore be within the purview of the National Labor Relations Act, without the activity itself thereby becoming interstate commerce so as to subject it to all the other federal laws affecting interstate commerce, or exempt it from state laws which are inapplicable, or may not be applied, to interstate commerce, because of the exclusive control over that commerce vested by the Constitution in the federal government.

Clearly, no one would claim that by reason of the decision of this Court that the labor-relations of the Consolidated Edison system were so intimately related to interstate commerce as to bring their regulation within the constitutional power of Congress, the *business* of the Consolidated Edison Company became part of interstate commerce within the purview of other statutes dealing with or regulating interstate commerce.[1] And, of course, no one would claim that the

[1] On a motion to dismiss the complaint of the Board because of lack of jurisdiction, the Consolidated pleaded a prior adjudication to the effect that it was not engaged in interstate commerce. This adjudication was in the form

decision of this Court in the *Consolidated Edison* case has turned the business of Consolidated Edison into interstate commerce so as to impair either the taxing or the regulatory power of the State of New York with respect to that *business*.

But it is the *business* of interstate commerce,—i. e., the *commerce itself*,—that is the subject-matter and the *concern* of the federal anti-trust laws.

In this connection it should also be remembered that there is a basic difference between the respective aims and purposes of the two statutes here under consideration, even in so far as interstate commerce itself is concerned,—a difference which we believe to be decisive in this case: *The National Labor Relations Act deals with obstructions to and interruptions of interstate commerce*, while the anti-trust laws deal with the *control* of the commerce itself. Of necessity, the Labor Relations Act must deal with matters which are outside of interstate commerce but may adversely affect

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of a decree entered in favor of the Consolidated in the United States District Court for the Southern District of New York in a suit brought by Consolidated and its affiliate companies against the Securities and Exchange Commission to obtain an adjudication that they were not subject to the provisions of the Public Utility Holding Company Act. * * * The decree sustained that contention and adjudged that the *business* of the Consolidated Edison system was wholly intrastate, and that the constituent companies "do nothing which directly burdens or affects interstate or foreign commerce." This prior adjudication was considered of so little relevancy to the issues under the National Labor Relations Act that it was not discussed by either the Court of Appeals or this Court. We take it that the decision of this Court in *Consolidated Edison Company* v. *N. L. R. B.*, holding that the *labor relations* of Consolidated *did* affect interstate commerce has not changed the status of that system's *business* under the Public Utility Holding Company Act. It is of some significance in this connection that the Public Utility Holding Company Act is, like the Anti-Trust Acts, part of Title 15 of the United States Code, which deals with "Commerce and Trade," while the National Labor Relations Act is part of Title 29 of the Code, which deals with "Labor."

it. But, we confidently submit, no one would claim that the anti-trust laws are concerned with the *control* of any business activity which is not itself interstate commerce. Most assuredly, anything that does not *monopolize* interstate commerce itself is no concern of the federal anti-trust laws. And the same is true with respect to *restraints*,—for restraints as envisaged in the Sherman Act does not mean *interruption*, but *control and regulation*. In other words, the subject-matter and concern of the federal anti-trust laws is the *manner in which interstate commerce is conducted and carried on*. In so far as *limitations* of that commerce come into question at all, they are the kind of limitations which are imposed as *methods of control* or monopolization. It is, therefore, clear that the National Labor Relations Act must of necessity cover a much wider field than the anti-trust laws. And it follows as a corollary, that an activity may be within the purview of the National Labor Relations Act without being within the purview of the Sherman Act. Which is the same as saying that decisions under the National Labor Relations Act have no necessary application to cases under the Sherman Act.

This brings us back to the problem of *intent* as a controlling factor in suits or prosecutions under the anti-trust laws. We have already seen that in order that a case may come within the purview of the federal anti-trust laws the *purpose* or object of the acts complained of must have been an intention to influence interstate commerce. But that is not all:

Not only must there be an intent to influence interstate commerce, but the influence must be by way of control and not merely by way of interruption, unless the interruption is itself merely a means to an end which is control.

PART TWO.

The anti-trust acts were not intended to apply to labor disputes; and if they were ever properly applicable to such disputes, they were made inapplicable by recent legislation.

POINT III.

"Labor Disputes" and "Labor Unions" Distinguished.

We respectfully submit, that much confusion in the discussion of the problem before us would be avoided if we approached the problem from the point of view of the activity rather than the organization involved. It is our contention that the federal anti-trust laws do not apply to labor unions as such. But that is not because all activities that a labor union might engage in are necessarily outside the purview of the Sherman Act, but because we believe that taking the labor movement as it is known to us, and applying ordinary legal principles as amplified by the Clayton Act and the Norris-LaGuardia Act, we can hardly suppose a set of facts which would bring a bona fide labor union within the purview of the Sherman Act. We need not go into that question here, however, since that would only complicate the present argument. We concede that labor union officials are subject to the provisions of the federal anti-trust laws; and for the purpose of the present discussion we shall assume that "labor union officials" and "labor unions" are convertible terms. But "labor disputes" is quite another matter,—and the present discussion is limited to the applicability of the federal anti-trust laws to *labor disputes*.[8]

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[8] In the following discussion, the terms "labor" and "labor disputes" are used as convertible terms, except where otherwise expressly stated.

POINT IV.

The Sherman Act was not intended by Congress to apply to labor disputes; and is not applicable to labor disputes according to correct principles of statutory interpretation.

This is not the place to re-examine, or even to review, the controversy over the intentions of Congress with respect to the applicability of the Sherman Act to labor. The present writer has gone into the subject at considerable length elsewhere,[9] and will state his conclusions here with due deference to the fact that in the *Danbury Hatters* case this Court has decided the historical question involved the other way. As stated in the articles referred to, it is the present writer's conviction that this Court has been led into error on the historical question by the fact, noted also by others,[10] that counsel for the employers in that celebrated case had placed before this Court a garbled version of the debates in Congress, and that garbled version was not challenged by counsel for the labor union, and this Court therefore assumed that the version presented by counsel for the employer was correct.

But we believe, that, important as the actual intention of Congress with respect to labor may be, the real significance of the debates in Congress at the time of the adoption of the Sherman Act lies in what Congress intended to *put into the Act* rather than in what it intended to *exclude therefrom*. In other words, it is not merely a question whether Congress intended to exempt labor from the operations of a law which would apply to labor but for the intention to exclude it, but rather, whether the law in question is one which would apply to labor in the absence of any evidence of intention one way or the other. The question before the courts should not have

[9] Boudin, The Sherman Act and Labor Disputes, 39 Columbia Law Review, 1283-1337 (Dec. 1939) and 40 Columbia Law Review, 14-54 (Jan. 1940).

[10] See Berman, Labor and the Sherman Act (1930), 86.

been limited to the question,—as unfortunately it was,—whether or not Congress had intended to exclude labor from the operation of the Sherman Act, but particularly whether the Act when construed by well-settled canons of statutory interpretation was properly applicable to labor by reason of the nature of the Act and the meaning of the legal terms used therein. And the answer to that question, we respectfully submit, must be in favor of non-applicability. Briefly stated, our contention is that: Assuming that we knew nothing of the intentions of Congress, and taking merely the text of the Act and applying to it the well-settled canons of statutory interpretation, the conclusion must be that the ordinary labor dispute is not within the purview of the Sherman Act.[11]

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[11] It is a well-settled canon of interpretation that legislative debates are not controlling in the interpretation of statutes, but may be resorted to in case of doubt. Bearing that in mind, it is permissible to resort to the intention of Congress with respect to the Act *generally*, in order to ascertain whether Congress intended to enact the common law into a federal statute or to enact something different from the common law. Such an examination will clearly demonstrate that it was the intention of Congress to enact the common law, and not to enact a law different or varying from the common law. As we believe to have demonstrated in the articles referred to, the condition of the law itself at the time of the adoption of the Sherman Act necessitates that conclusion. But if there were any doubt on the subject, it must be dispelled by a resort to the statements of Senator Hoar in explaining the Act to the Senate. On the other hand, the argument from the dropping of the amendments excluding labor, which had been introduced prior to the sending of the Sherman Act to the Judiciary Committee, are completely answered by the fact that the Act as it emerged from the Judiciary Committee was the "Sherman Act" no longer, but the "Hoar Act," or at least the Judiciary Committee Act, which bore no legal resemblance to the original Act, with respect to which the amendments excluding labor had been introduced and adopted. And in its new (the present) form, the text itself, because of the settled meaning of the legal terms employed, excluded labor.

POINT V.

The Clayton Act was intended to definitely exclude labor disputes from the purview of the federal anti-trust laws.

We respectfully submit that the intention of Congress in enacting Section 6 of the Clayton Act was to correct the error into which this Court had fallen in its decision in the *Danbury Hatters* case, and to definitely exclude labor disputes from the purview of the federal anti-trust laws.[12] It is impossible here to go into the pre-history of that famous piece of legislation. Suffice it to say, that it was the result of great agitation on the part of labor against the use of a statute intended to curb trusts for the purpose of curbing labor activities. Nor was the complaint on that score limited to labor. On the contrary, the use of the anti-trust act against labor had been branded as a misuse by many conservative lawyers and statesmen. It must be remembered in this connection, that, as already stated, up to that time there had been only one case in which this Court had applied the Sherman Act to labor, and that was the *Danbury Hatters* case, decided in 1908. It is also a matter of history that it was immediately after that decision that the agitation assumed the vast proportions which led to the adoption of the

[12] The present writer must state frankly that he has not examined the congressional debates preceding the enactment of the Clayton Act with the same thoroughness as he has examined those preceding the Sherman Act. Nor has he given the problem of statutory construction involved in the Clayton Act the same minute consideration that he has given to that involved in the Sherman Act. But he feels bound to state that whatever he has examined in either connection bears out the statement in the text with respect to the intentions of Congress, and leads him to the conclusion that, as a pure question of statutory construction, the result with respect to the Clayton Act must be the same as that with respect to the Sherman Act.

so-called "labor sections" of the Clayton Act. We would, therefore, be bound to assume, even in the absence of any specific evidence to that effect, that it was the intention of Congress to change the rule laid down by this Court in the *Danbury Hatters* case,—which means *the very principle of applicability* of the Sherman Act to labor. It seems to us rather futile to argue that the intention of Congress in enacting Section 6 of the Clayton Act was merely to legalize the existence of labor unions, since there had been only one case of an inferior court in which a labor union had been referred to as an illegal combination under the Sherman Act.

That case was clearly against the current of legal decision, both in the state and in the federal courts, and no one seriously worried that this Court would so hold if the question were presented to it for decision. But we need not speculate on the subject, since we have the explicit statement on the subject of the Committee of Congress which framed the Act in question. It will be recalled that the Clayton Act, so-called, was a measure introduced into the House of Representatives by Mr. Clayton, of Alabama, after whom the Act is named. As adopted in the House, the section in question was known as Section 7, and was renumbered Section 6 after certain amendments had been made to the Act as a whole in the Senate. Upon reaching the Senate, the House bill was referred to the Senate Committee on Judiciary, which reported it to the Senate with amendments, and a recommendation that it be adopted as amended. In its report to the Senate, the Senate Judiciary Committee said with respect to the section then known as Section 7 of the bill, and now known as Section 6 of the Clayton Act:

> "This is the section which declares that nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, horticultural and other organizations, instituted for the purposes of mutual help, and in having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from law-

fully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

"The Senate amendments propose to strike out 'fraternal' organizations, because, in the opinion of the Committee, not even a forced construction can bring them under the ban of the antitrust laws, and there is no reason for including them in this enactment. It is also proposed to strike out 'consumers' in this paragraph. This is recommended by the Committee upon the ground that 'consumers' in the economic sense in which the word is used in the bill, while probably intended to apply only to consumers of food products and clothing, is susceptible of much abuse if in the unrestricted sense it is applied, as possibly it may be in imaginable cases, to all character of consumers, including corporations generally, as they are unquestionably consumers. But the principal consideration which moved the Committee to strike out 'consumers,' which also applies in a less degree to 'fraternal' organizations, is that they believe the only organizations which should be excluded *from the operation* of the antitrust laws are those where labor is the basis or one of the chief factors in the organizations, as in the case of labor organizations proper, and in agricultural and horticultural organizations. *The Committee rest this distinction upon the broad ground that labor is not, and ought not to be regarded as, a commodity, within the purview of antitrust laws.*"

Senate Report No. 698, 63rd Congress, Second Session, p. 46.

Clearly, this could not possibly have referred to a section intended to legalize the existence of labor unions. The Committee expressly says that the intention is to exclude labor from the "*purview of antitrust laws.*"[13]

[13] We regret that the exigencies of time do not permit us to discuss this phase of the subject as adequately as we should, on the basis of our investigation in so far as we have already gone into the subject. In this connection, the pres-

POINT VI.

If the federal anti-trust laws have ever been applicable to labor disputes they were made inapplicable to such disputes by recent congressional legislation.

We respectfully submit, that the course of congressional legislation with respect to labor commencing with the enactment of the Norris-LaGuardia Act clearly indicates an intention on the part of Congress to exempt the ordinary activities of labor unions from the operation of the anti-trust laws. We further submit, that as a matter of law, those congressional enactments make the federal anti-trust laws inapplicable to the ordinary labor union activities, irrespective of the nature of the means employed. Again, we say; that, by that we do not mean any activities of labor union officials, but only those activities which are designed to further the purposes of labor unions, namely, the organization of workers into a union of their craft,—with the right to have one union in one craft; the raising of wages, and the improvement of other terms of employment,—including the right to demand the closed-shop as one of such terms; and the employment of the usual weapons employed

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ent writer desires to state that he learned on March 6 that, at a meeting held the preceding Saturday, the Executive Board of the National Lawyers Guild decided to invite him to file this brief. And he was informed at the same time that the attorneys for the petitioner would not consent to this brief being filed unless it was served on them on or before March 15. Further negotiations resulted in an extension of time to March 18. At the time of receipt of this information the writer was engaged in the trial of a long and difficult case which required close and unremitting attention. The case is still on trial as this brief goes to the printer. This is stated here by way of apology for the sketchiness of this brief, of the deficiencies of which we are conscious,—because we had, in the articles referred to, animadverted on the poor quality of the briefs usually submitted by counsel who have presented labor's side of the argument on this subject before the courts.

by labor unions in the pursuit of those purposes, which may result in or constitute labor disputes.

Without going exhaustively into this subject, we shall mention only three congressional acts, in the order of their enactment. They are:

Norris-LaGuardia Act (U. S. Code, Title 29, Secs. 101-115);

Anti-Racketeering Act (U. S. Code, Title 18, Secs. 420a-420e);

National Labor Relations Act (U. S. Code, Title 29, Secs. 151-166).

(a) The Norris-LaGuardia Act.

In order that the bearing of the first of these acts on the problem of the applicability of the federal anti-trust laws to labor union activities may become clear, we must begin by an examination of the state of the law with respect to the federal anti-trust laws at the time of the enactment of that Act. In examining the language of the Sherman Act two things become clear: First, that we are dealing with a statute which had two ends in view, and sought to accomplish two purposes, treated in the first two sections of the Act, namely:—(a), the protection of *consumers* against high prices; and, (b), keeping the gates of commerce open to all comers. And, second, that the question of means has no relevancy whatever to the purposes or provisions of the Act. Stated differently, there was a unified *purpose,—the maintenance of competition,*—which would have two results; on the one hand it would secure to all those desiring to engage in commerce an opportunity to do so, and, on the other hand, it would protect the consuming public against an artificially high level of prices. And to neither of these purposes is the question of means relevant.

The purpose of the statute being the preservation of competition, there has always been grave doubt as to the applicability of the Sherman Act to the activities of labor unions, quite apart from the problem of the specific infer-

tion of Congress as revealed by the debates preceding the enactments of the Sherman Act, since both Congress and the courts had frequently expressed their approval of labor unions and their activities. So strong was this doubt that it survived the decisions of this Court holding that, as a general proposition, the Act was applicable to labor unions in at least some of their activities. In this connection, we must bear in mind what Mr. Justice Stone said in the *Bedford Cut Stone* case.

> "As an original proposition,—said Mr. Justice Stone,—I should have doubted whether the Sherman Act prohibited a labor union from peaceably refusing to work upon material produced by non-union labor or by a rival union, even though interstate commerce were affected. In the light of the policy adopted by Congress in the Clayton Act, with respect to organized labor, and in the light of Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L. R. A. (N. S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734; United States v. American Tobacco Co., 221 U. S. 106, 178-180, 55 L. ed. 663, 693, 694, 31 Sup. Ct. Rep. 632, I should not have thought that such action as is now complained of was to be regarded as an unreasonable and therefore prohibited restraint of trade."
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> *Bedford Cut Stone Co. v. Journeymen S. C. Asso.*, 274 U. S. 37, 55-56.

Mr. Justice Stone considered himself, however, constrained by the authority of the *Duplex* case[14] to hold otherwise, and so did Mr. Justice Sanford. Mr. Justice Brandeis dissented in a vigorous opinion, in which Mr. Justice Holmes concurred. These two decisions settled the law for the time being, *and settled it so as not to differentiate as to the means whereby the restraint or control is brought about.*

That was the necessary consequence of bringing labor disputes within the purview of the anti-trust laws. The anti-trust laws look to the *economic effects* of certain commercial

[14] *Duplex Printing Press Co. v. Deering*, 254 U. S. 443.

or industrial activities. They are not concerned with *the means* whereby these effects are brought about. Indeed, as may be seen from the language of the Sherman Act, the first concern of Congress were *contracts* or *agreements* in restraint of trade. The opening words of the Sherman Act are: "Every *contract*." And every case dealing with the subject makes it as clear as language can possibly make it that what is banned by the Sherman Act is *the agreement to control* trade and not the means whereby that agreement is carried out or the control effected. That that is no different in labor disputes was made clear by the *Loewe* case which definitely brought labor disputes within the purview of the Sherman Act, and by the two cases just referred to which kept labor disputes within that purview notwithstanding the exemption contained in the Clayton Act.

Loewe v. *Lawlor*, 208 U. S. 274.
Duplex Printing Press Co. v. *Deering*, 254 U. S. 443.
Bedford Cut Stone Co. v. *Journeymen Stone Cutters' Ass'n*, 274 U. S. 37.

In the *Duplex* case, this Court, after reviewing the earlier decisions on the subject, said:

> "*It is settled by these decisions that a restraint produced by peaceable persuasion is as much within the prohibition as one accomplished by force or threats of force*; and it is not to be justified by the fact that the participants in the combination or conspiracy may have some object beneficial to themselves or their associates which possibly they might have been at liberty to pursue in the absence of the statute." (Italics supplied.)
>
> *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 467-468.

And in the *Bedford Cut Stone* case this Court said, referring to the decision in the *Duplex* case:

> "The court further held that by prior decisions of this court, it had been settled that a restraint of interstate commerce produced by peaceable persuasion was as much within the prohibition of the Anti-trust Act as one accomplished by force or threats of force."

And then this Court proceeded to say:

> "Whatever may be said as to the motives of the respondents or their general right to combine for the purpose of redressing alleged grievances of their fellow craftsmen or of protecting themselves or their organizations, the present combination deliberately adopted a course of conduct which directly and substantially curtailed, or threatened thus to curtail, the natural flow in interstate commerce of a very large proportion of the building limestone production of the entire country, to the gravely probable disadvantage of producers, purchasers and the public; and it must be held to be a combination in undue and unreasonable restraint of such commerce within the meaning of the Anti-trust Act as interpreted by this court. * * * Any suggestion that such concerted action here may be justified as a necessary defensive measure is completely answered by the words of this court in Eastern States Retail Lumber Dealers' Asso. v. United States, 234 U. S. 600, that 'Congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly *restrain competition* or unduly obstruct the free flow of such commerce.'"
>
> *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n.*, 274 U. S. 37, 50, 54.

The *Bedford Cut Stone* case involved *a peaceful strike, and that decision made that peaceful strike illegal.*

Such is the law today with respect to strikes in industries in interstate commerce if the decision in the *Bedford Cut Stone* case is still the law. And such will be the law in *every industry affecting interstate commerce* if the judgment of the District Court sought to be reinstated be the law. In other words, if the judgment of the District Court be upheld, it does not mean that the petitioner herein is entitled to recover because of the alleged "illegal" acts claimed to have been committed by the respondents, but that the petitioner would be entitled to recover triple damages even if the damage had resulted from a peaceful strike, as was the situation in the *Bedford Cut Stone* case. Petitioner would also be entitled to injunctive relief; and that irrespective of the means em-

ployed in accomplishing the interruption of and damages to petitioner's business.

Let us now see how that can be squared with the Norris-LaGuardia Act.

We respectfully submit, that upon examination it will be found that there is absolutely no way of squaring that enactment with the rule of law laid down in the *Bedford Cut Stone* case, or with the judgment of the District Court in this case. In this connection it must be remembered that under the Sherman Act as amended by the Clayton Act, there is no difference between the right to injunctive relief and the right to triple damages. Nor, for that matter, between civil liability and criminal liability. Each violation of the Sherman Act subjects the violator to a claim for triple damages and injunctive relief at the suit of the injured party, as well as to punishment under the criminal provisions of the Act. There is no distinction in principle, and we know of no case that has attempted to make the distinction; except, of course, that criminal liability must be *proven* under the principles governing criminal prosecutions.

There certainly is no distinction between the two civil remedies of triple damages and injunctive relief. There never was any as far as the substantive law is concerned, except that under the Sherman Act itself an injunction could only issue at the suit of the Government. There never was any distinction as to the nature of the agreement or activity upon which the claim of violation is based. And since the Clayton Act there is no distinction as to who may invoke the process of the court in an injunction suit. In the present case, therefore, petitioner, if the judgment of the District Court be correct, was entitled to injunctive relief, and an injunction should have issued in its favor when it sought that remedy. Indeed, such was the decision of the Circuit Court of Appeals in that suit. Furthermore, under the doctrine of the *Bedford Cut Stone* case, petitioner's right to injunctive relief did not depend on the acts alleged in the complaint claimed to be illegal *per se*, but would follow if the same result had been obtained by peaceful means. But,

on the other hand, Congress has emphatically stated in the Norris-LaGuardia Act that petitioner is *not* entitled to injunctive relief against a strike as such or peaceful picketing. Section 4 of the Norris-LaGuardia Act says:

> "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute from doing, *whether* singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment * * *
>
> (b) Giving publicity to the existence of or the facts involved in any labor dispute, *whether by advertising, speaking, patrolling* or by any other method not involving fraud or violence." (Italics supplied.)

We respectfully submit that there can be no doubt of the fact that by the Norris-LaGuardia Act the courts of the United States are specifically prohibited from issuing the kind of injunctions which were approved in the *Duplex Press* and *Bedford Cut Stone* cases. It is, therefore, beyond dispute that the injunctive relief provided for by the Clayton Act has been abolished as to labor disputes. And, we respectfully submit, it would be imputing irrationality to the Congress of the United States to assume that it had intended to exempt labor unions from the provision of the Clayton Act granting relief to individuals who suffered from violations of the Sherman Act, but left the labor unions subject to the triple damages provision of that Act. The *rationale* of our anti-trust laws does not permit such a course.

(b) The Anti-Racketeering Act.

The significance of the Anti-Racketeering Act, which is entitled "An Act to Protect Trade and Commerce Against Interference by Violence, Threats, Coercion, or Intimidation" is twofold:

In the first place, it clearly demonstrates, if further proof were necessary, that Congress carefully differentiates, in its legislation, between legislation intended to deal with matters illegal *per se*,—i. e., criminal acts, as such,—in so far as they affect matters within the legislative competence of Congress, on the one hand, and legislation intended to accomplish social, commercial, or economic ends. The first class of legislation deals with the nature of the acts involved, while the second class of legislation deals with the objects intended or results accomplished, irrespective of the means employed. The Anti-Racketeering Act is, therefore, part of Title 18 of the United States Code, which treats of criminal acts and lays down the law affecting crimes. The anti-trust acts, on the other hand, are part of Title 15, United States Code, which deals with or treats of commerce and trade. The latter class of legislation may contain many criminal provisions, but its provisions are intended not as the punishments for crime as such, but to prevent certain economic results; and they are, therefore, only applicable where the object of the acts made criminal is to accomplish the economic results sought to be guarded against.

The other aspect of the Anti-Racketeering Act, that which we believe to be most significant in our connection, is, that even where the Congress is dealing with acts illegal *per se*,—even in a criminal statute having as its subject violence, coercion and intimidation, Congress is most careful to exclude the ordinary activities of labor unions from its operation. Section 6 of the Anti-Racketeering Act (U. S. Code, Title 18, Sec. 420d), contains the following proviso:

> "* * * *Provided*, That no court of the United States shall construe or apply any of the provisions of this Act in such manner as to impair, diminish, or in any manner affect the rights of bona fide labor organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States."

The meaning of this proviso, we respectfully submit, is that even where the Act or "conspiracy" in question would

be such as to come within the provisions of the Act but for the proviso, it is not to be considered within the Act if the Act was committed in carrying out the legitimate objects of a bona fide labor union. *Otherwise, the proviso would be meaningless.*

That does not mean, of course, that Congress intended that acts of the kind described in this Act should go unpunished if they are employed in the pursuit of the legitimate objects of a labor union. But merely that punishment for such acts should be visited upon the individuals committing them, and under the ordinary criminal laws of the state or nation, as the case might be.

An act of violence committed by a misguided individual or group of individuals, in the pursuit of what they may deem to be, or which might actually be, a legitimate labor union object, is to be punished,—but it is to be punished as the act of those individuals, and under the ordinary criminal law; and not in pursuance to any act intended either to *regulate or to protect trade and commerce. Labor union activities are not part of trade and commerce as Congress conceives of these matters.* Congress, in this legislation as well as other legislation, was manifestly much concerned over the practise, unfortunately prevalent in our courts, of considering labor disputes part of trade and commerce, and to apply to such disputes every piece of legislation intended for the protection of trade and commerce; and was anxious to prevent it in this case.

This piece of legislation, incidentally, sheds great light on the labor provisions of the Clayton Act. Those provisions had by 1934 been emasculated of their true meaning by a narrow interpretation which limited the provisions of that Act to the protection of the bare existence of labor unions. We respectfully submit, that the Anti-Racketeering Act was an accusing finger pointed at those decisions,—or at least a guiding finger pointed to future decisions,—intended to show that Congress was not concerned merely with the existence of labor unions, but with a far more important subject,—

the protection of labor unions against the application to them and to their activities of every piece of legislation intended to protect trade and commerce either against illegal acts *per se* or undesirable economic results.

(c) The National Labor Relations Act.

But most important of all is the National Labor Relations Act.

If there be any doubt as to the extent of the effect of the Norris-LaGuardia Act on the federal anti-trust laws in their relation to labor, there can be none whatever as to the effect of the National Labor Relations Act,—*for that Act specifically legalizes the things which the anti-trust laws were designed to prevent.*

As already pointed out, the purpose of the anti-trust laws is to protect the public against the raising of prices and the monopolization of commerce through combination. But both of these things are specifically sanctioned, as far as labor is concerned, by the National Labor Relations Act. Indeed, it may be truthfully said that the purpose of that Act is *exactly the reverse* of the purpose of the anti-trust laws: The anti-trust laws are designed to foster competition by preventing combination, while the National Labor Relations Act is designed to foster combinations of workers by encouraging collective rather than competitive action. Indeed, this policy of fostering collective, as opposed to individual, competitive action, has been the policy of Congress with respect to labor for many years prior to the enactment of the National Labor Relations Act. It is indicated in the Norris-LaGuardia Act, which, in Section 3, outlaws the so-called yellow-dog contract. And the policy that was indicated in the Norris-LaGuardia Act is made the pivot about which turns that comprehensive piece of legislation known as the National Labor Relations Act. The first section of that Act commences with the declaration that—

> "The denial by employers of the right of employees to organize and the *refusal of employers to accept the*

> *procedure of collective bargaining* leads to strikes and other forms of industrial strife and unrest, which have the intent or the necessary effect of burdening or obstructing commerce."

And it winds up in the following declaration of policy:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred *by encouraging the practice and procedure of collective bargaining.*"

Having thus attested the fact that the opposition of employers to the procedure of collective bargaining *is detrimental to interstate commerce*, and having declared the policy of the United States to be to encourage *collective* instead of individual, competitive, bargaining, the Act proceeds to specifically sanction closed-shop agreement,—which have hitherto been denounced by the opponent of labor unions as the very essence of monopoly,—by declaring in Section 8, subsection (3)—

> "That nothing in this Act * * * *or in any other statute of the United States*, shall preclude an employer from making an agreement with a labor organization, to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made." (Italics supplied.)

It seems to us clear that the italicized words in the above quotation were deliberately inserted by Congress with a view to the federal anti-trust acts. But whether or not these particular words were so intended, there can be no doubt of the fact that the entire Act puts the matter beyond dispute independent of any particular provision, because of the spirit underlying and the purpose intended to be accomplished by the Act. Clearly, Congress could not possibly have intended

that the collective bargaining agencies which it sought to foster and encourage should be hampered in their activities by holding these activities illegal and subject to the provisions of the anti-trust laws.

Before leaving this subject, it is perhaps also worth noticing the language of Section 13 of the Act, which declares that—

> "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike."

The right to strike is not only assumed to exist, but is considered as a fundamental right. Indeed, it could not be treated otherwise, in view of the provisions of the Norris-LaGuardia Act; and this section was apparently inserted as a safeguard against the contention that the National Labor Relations Act has nullified some of the provisions of the earlier Act because of the fact that it declares its purpose to be the prevention of strikes.[15] This provision makes it clear that while the ultimate purpose of the National Labor Relations Act is the prevention of strikes, the facts referred to in its opening statement had convinced Congress that the only way of preventing strikes is by fostering collective bargaining. Hence the declaration of policy contained in the first section of the Act.

But if the judgment of the District Court be correct, then the latest declaration of policy by Congress, as well as its elaborate legislation on the subject, has been utterly futile,—since the policy of collective bargaining through labor unions which it has attempted to foster and encourage will be defeated by an application of the anti-trust laws.

Again, we say, it must always be borne in mind that the right of the petitioner herein to recover does not depend on the *nature of the acts* alleged in the bill of complaint, but upon the effect of those acts in causing the cessation of production. The acts themselves were clearly matters of local concern, and redress for any damage caused by them

[15] An argument which counsel for employers were not slow to make even in the face of this specific provision.

can be had in the state courts. This action is, therefore, not based on the illegality *per se* of the acts alleged in the complaint, but on their alleged illegality under the anti-trust laws because of their *effect* on interstate commerce. The economic effect would have been the same if only peaceful means had been employed; and, as we have already pointed out, the legal result would follow irrespective of the nature of the means employed. *If, therefore, labor union activities are still subject to the provisions of the federal anti-trust laws, Congress has certainly labored in vain in rearing the elaborate structure of the National Labor Relations Act.*

POINT VII.

Some Activities and Decisions Distinguished.

It is perhaps unnecessary for us to repeat that in speaking of labor union activities under the preceding point, we were referring to what we believe was intended by the phrase "legitimate objects" used in Section 6 of the Clayton Act,—*activities directed towards organization or affecting the terms of the labor contract.* But in order to guard against any misunderstanding, we desire to repeat that our contention as to the inapplicability of the anti-trust laws to labor is limited to situations involving or growing out of a labor dispute, or situations which might lead to a labor dispute as thus envisaged. We do not claim that this exemption or inapplicability covers a situation such as existed for many years in the poultry industry in the City of New York and discussed by this Court in

Local 167, I. B. T. v. U. S., 291 U. S. 293,

and by other courts in

U. S. v. Greater N. Y. Live Poultry Chamber of Commerce, et al., 30 F. (2d) 939.
U. S. v. Same, 34 F. (2d) 967.

Nor to a situation such as existed in the dressers and dyers industry in the locality as disclosed in

U. S. v. Buchalter, 88 F. (2d) 625.
U. S. v. International Fur Workers Union, 100 F. (2d) 541.
U. S. v. Shapiro, 103 F. (2d) 775.

In the first of those situations there was a conspiracy by merchants to monopolize the trade in and control the price of a commodity in interstate commerce, and the labor unions and labor-union-officials involved had made themselves parties to *that* conspiracy. As we have already indicated, we have some doubt as to whether or not even in that situation the anti-trust acts were properly applied to the labor union. But that doubt is not due to any question as to the applicability of the anti-trust laws to the situation, but merely to the fact that we believe that labor union officials acting in the manner in which they acted in the situation may well have been considered to have acted *ultra vires*. That is, however, a matter involved in some difficulty and need not be gone into here, since it is not part of our argument. There can be no doubt of the fact that the conspiracy as such was one falling within the purview of the federal anti-trust laws, and that all actual participants therein could be prosecuted or sued under the Sherman Act.

The same is true of the situation involved in the second set of cases. In that situation there was a conspiracy among what might be called merchant fur-dressers to monopolize the trade and control the price of dressing in the metropolitan area of New York, and a labor union and labor union officials had made themselves parties to *that conspiracy*. Assuming that the activity of dressing and dyeing is commerce within the constitutional meaning of that term as well as within the meaning of the Sherman Act, the conspiracy itself was clearly within the purview of that Act, and all those actually participating in that conspiracy were properly sued and convicted for its violation.

But neither of those situations involved a labor dispute, or a legitimate labor-union activity, since the monopolization of trade or the control of prices in trade or commerce is not part of the objects of a *bona fide* labor union, and anything done in pursuance to such a conspiracy cannot possibly be considered a *bona fide* labor dispute.

Conversely, anything that involves a bona fide labor dispute cannot possibly be considered either an attempt to monopolize or restrain trade or commerce, and cannot, therefore, come within the purview of any anti-trust laws, federal or state.

CONCLUSION.

The federal anti-trust laws are not applicable to labor disputes. But whatever rule of the applicability of the federal anti-trust laws to labor disputes we may apply,—whether the rule contended for by us or that which was the accepted rule prior to the decisions of this Court under the National Labor Relations Act,—the decision of the Circuit Court of Appeals here under review was clearly right, and should be affirmed.

Dated: New York, March 15, 1940.

Respectfully submitted,

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